INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	12
Appendix	13

CITATIONS

Cases:

American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401 — 11

American National Bank of St. Paul v. *National Labor Relations Board*, 144 F. 2d 268 — 9

10 East 40th Street Building, Inc. v. *Callus*, No. 820, October Term, 1944 — 12

Endicott Johnson Corp. v. *Perkins*, 317 U. S. 501 — 6, 8, 10, 11

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 — 9, 10, 11

National Labor Relations Board v. *Bank of America Association*, 130 F. 2d 624, certiorari denied, 318 U. S. 791, rehearing denied, 319 U. S. 782 — 8

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 — 11

Newport News Shipbuilding & Dry Dock Co. v. *Schauffler*, 303 U. S. 54 — 9, 10

Oklahoma Press Publishing Co. v. *Walling*, 147 F. 2d 658, certiorari granted, No. 61 this Term — 11

Perkins v. *Lukens Steel Co.*, 310 U. S. 113 — 11

Pittsburgh Plate Glass Co. v. *National Labor Relations Board*, 313 U. S. 146 — 11

Polish National Alliance v. *National Labor Relations Board*, 322 U. S. 643 — 9

Walling v. *La Belle Steamship Co.*, 148 F. 2d 198 — 11

Walling v. *News Printing Co., Inc.*, 148 F. 2d 57, certiorari granted, No. 63, this Term — 11

659785—45——1

Statutes: Page
Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. 201... 11
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, et seq.):
Sec. 2... 13
9... 3, 7, 11, 13
10... 10, 11, 15
11... 3, 7, 18
Walsh-Healy Act, 49 Stat. 2036, 41 U. S. C. 35–45... 8

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 189

THE NORTHERN TRUST COMPANY, JAMES A. RUSSELL, MAURICE E. GRAVES, AND E. LEROY HALL, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

No. 190

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AMERICAN NATIONAL SAFE DEPOSIT COMPANY, MELVIN L. STRAUS, AND J. H. KLUG, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 1, 54–61; R. 2, 69–76) [1] is reported in 56 F. Supp. 335. The

[1] The symbol "R. 1, —" refers to the printed record in No. 189. The symbol "R. 2, —" refers to the printed record in No. 190.

opinion of the circuit court of appeals (R. 1, 80–90; R. 2, 102–112) is reported in 148 F. 2d 24.

JURISDICTION

The judgments of the circuit court of appeals were entered on February 28, 1945 (R. 1, 90–91; R. 2, 112–113). The petitions for writs of certiorari were filed on July 2, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the district court had power to order an employer to comply with subpenas, issued by the National Labor Relations Board in aid of its investigation pursuant to Section 9 (c) of the National Labor Relations Act, without first deciding that the employer is subject to the Act.

2. Whether the evidence relating to the operations and interstate transactions of the petitioning banks, ordered produced by the district court, is plainly incompetent or irrevelant to any question which the Board may lawfully investigate in proceedings instituted under Section 9 (c) of the Act by employees of the banks.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) are set forth in the Appendix, *infra,* pp. 13–19.

STATEMENT

The subpenas involved in these cases were issued by the National Labor Relations Board in the course of and in aid of its functions in proceedings[2] before it under Section 9 of the National Labor Relations Act, and pursuant to the authority vested in it by Section 11 (1) of the Act. The proceedings referred to were originated by two petitions for investigation and certification of representatives pursuant to Section 9 (c) of the Act, both filed with the regional director for the Board's Thirteenth Region, Chicago, Illinois, by the Protective Service Employees of Chicago, Local 240, Building Service Employees International Union, affiliated with the American Federation of Labor (R. 1, 10–11; R. 2, 96–97). The petitions allege that the armed guards other than supervisors employed by the Northern Trust Company (one of the petitioners in No. 189), hereinafter referred to as the Trust Company, and the armed guards other than super-

[2] These proceedings are known on the records of the Board as "*In the Matter of The Northern Trust Company and Protective Service Employees of Chicago, Local 240, Affiliated with the Building Service Employees International Union (AFL)*; Case No. 13–R–2112" (R. 1, 10–11), and "*In the Matter of American National Bank and Trust Company of Chicago and American National Safe Deposit Company, its wholly owned subsidiary, and Protective Service Employees Union of Chicago, Local 240, affiliated with Building Service Employees International Union (A. F. of L.)*; Case No. 13–R–1924" (R. 2, 96–97).

visors employed by the American National Bank and Trust Company of Chicago and the American National Safe Deposit Company (two of the petitioners in No. 190) hereinafter referred to as the Bank and Deposit Companies, constitute units appropriate for collective bargaining; that the Trust Company and the Bank and Deposit Companies refuse to recognize the Union as representative of these units of employees until the Union is certified as such by the Board; and that the questions concerning representation which have arisen are questions affecting commerce within the meaning of the Act.

The Board, in accordance with its customary practice, instituted preliminary investigations to determine whether the petitions should be entertained. During the investigations, Board agents requested the Trust Company and the Bank and Deposit Companies to furnish certain information concerning their operations and concerning their employees in the alleged appropriate units (R. 1, 44; R. 2, 4–5). The Trust Company and the Bank and Deposit Companies refused to supply the requested information (R. 1, 45–46; R. 5).

In furtherance of its investigations, the Board thereafter scheduled hearings before Trial Examiners and, acting in each instance through one of its members, issued and caused to be served subpenas *duces tecum*, directing the Trust Company, and the Bank and Deposit Companies, to appear at the respective hearings and produce

certain specified books and records (R 1, 12–14; R. 2, 14–19). The Board also issued and caused to be served upon James A. Russell, vice president and comptroller of the Trust Company, Maurice E. Graves, second vice president and assistant comptroller of the Trust Company, E. LeRoy Hall, second vice president and assistant comptroller of the Trust Company, J. H. Klug, comptroller of the Bank, and Melvin L. Straus, president of the Deposit Company, subpenas *ad testificandum,* directing each of them to appear and testify at the respective hearings (R. 1, 15–20; R. 2, 20–23). The witnesses subpenaed did not appear and the subpenaed documents were not produced. The hearings were thereupon adjourned (R. 1, 7; R. 2, 9).

On March 10, 1944, the Board, pursuant to Section 11 (2) of the Act, filed, in the district court, applications for orders requiring obedience to the subpenas (R. 1, 2–9; R. 2, 2–11). The applications allege that the documents enumerated in the subpenas are material and necessary to the Board's investigations of the questions whether or not the operations of the Trust Company and the operations of the Bank and Deposit Companies affect interstate commerce within the meaning of the Act, whether or not the units are appropriate, and whether or not the employees involved have shown sufficient interest in representation by the Union to warrant the holding of an election by the Board.

In response to orders to show cause why the subpenas should not be enforced (R. 1, 49; R. 2, 25–26), the Trust Company and its officers, and the Bank and Deposit Companies and their officers, filed joint and several answers (R. 1, 21–32; R. 2, 27–50) in which they took the position, as summarized by the district court (R. 1, 55; R. 2, 71),

> * * * first, that the National Labor Relations Act does not apply to the Bank because banking in its nature cannot constitute or affect interstate commerce, second, if it should be held that banking might conceivably affect such commerce it does not necessarily do so, and that the Board is not entitled to an order compelling compliance unless it is shown that the business of respondent's bank affects such commerce and that such showing has not been made here. * * *

After oral argument and the filing of briefs, the district court issued its decision (R. 1, 54–61; R. 2, 69–76) and orders requiring obedience to the subpenas subject to certain qualifications as to the manner of compliance which are not material here (R. 1, 61–64; R. 2, 76–81).

The circuit court of appeals affirmed (R. 1, 80–90; R. 2, 102–112). It held that the principles enunciated in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, were applicable to the instant case, and that the Board's jurisdiction to determine initially whether petitioners are subject to the

Act is no more shifted to the district courts by the Board's application for enforcement of its subpena than by an employer's application for an injunction. The court further rejected petitioners' contention that "as a matter of law no bank can be engaged in interstate commerce" (R. 1, 85; R. 2, 107) and held that the Act authorized the Board's investigations, to which the evidence called for by the subpenas was clearly relevant and material.

ARGUMENT

Section 9 (c) of the National Labor Relations Act (Appendix, *infra,* p. 14) authorizes investigation by the Board "whenever a question affecting commerce arises concerning the representation of employees." Section 11 (1) (Appendix, *infra,* p. 18) provides that "any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question" before the Board. Section 11 (2) (Appendix, *infra,* p. 19) provides that "In case of contumacy or refusal to obey a subpena issued to any person" the district courts "shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question." In matters

659785—45——2

relating to the compulsory production of evidence, this statutory scheme establishes a division of functions between the Board and the district courts identical with the division of functions between the administrator and the district courts which is established by the Walsh-Healy Act.[3] In *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 509, arising under that Act, this Court held that the district courts are required to order the production of evidence subpenaed by the administrator, the Secretary of Labor, unless such evidence is "plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act." The same rule is applicable here.

Petitioners contend (No. 189, Pet. 13–14, Br. 33–43) that their banking business does not necessarily come within the coverage of the National Labor Relations Act, and argue that the evidence subpenaed by the Board relating to petitioners' banking operations and interstate transactions cannot establish that petitioners are subject to the Act and that such evidence is therefore irrelevant and immaterial. The court below (R. 1, 85; R. 2, 107), as did the district court (R. 1, 55–56; R. 2, 71), considered and rejected the view that banks as a class are not covered by the Act. *National Labor Relations Board* v. *Bank of America Association,* 130 F. 2d 624 (C. C. A. 9), certiorari

[3] 49 Stat. 2036, 41 U. S. C. 35–45.

denied, 318 U. S. 791, 792, rehearing denied, 319 U. S. 782; *American National Bank of St. Paul* v. *National Labor Relations Board,* 144 F. 2d 268 (C. C. A. 8); cf. *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643. And it is nowhere claimed that all banks are necessarily engaged in commerce within the meaning of the Act. Petitioners' contention to the contrary notwithstanding (No. 189, Br. 41–42), no lengthy recital is necessary to prove that the evidence ordered produced by the district court (R. 1, 62–63; R. 2, 77–81) is relevant to the questions lawfully pending before the Board: whether the operations of the petitioners in these cases affect commerce within the meaning of the Act, whether the units are appropriate, and whether the Union has sufficient support to justify the conduct of an election.

But petitioners contend that by refusing to furnish information relevant and material to the Board's investigation, they can shift the burden of investigating and determining these questions initially from the Board to the district courts. Petitioners would thereby accomplish indirectly, in a subpena enforcement action, the very result which the decisions of this Court in *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler,* 303 U. S. 54, 57, and *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 47–52, preclude them from accomplishing directly in an injunction proceeding. The twin doctrines of "primary jurisdic-

tion" and "exhaustion of administrative remedies" which constitute the rationale of the *Newport News* and *Myers* cases, are, of course, equally applicable to proceedings under Section 9 as to proceedings under Section 10 (see Appendix, *infra,* pp. 13–18). The power to investigate representation questions "affecting commerce", no less than the power to prevent unfair labor practices "affecting commerce" (Section 10 (a)), was vested by Congress in the Board and not the courts. Cf. *Endicott Johnson* v. *Perkins,* 317 U. S. 501, 507. There is no more warrant in one case than in the other for precluding the Board, at the threshold of investigation, from determining whether or not an employer is subject to the Act and whether the Board has jurisdiction to proceed. Were judicial determination of coverage required at this stage of proceedings, it would mean, as the court below put it, that the Board would be required "to come into the District Court and prove that a question affecting commerce had arisen before it (the Board) had had a chance to investigate whether such a question actually existed" (R. 1, 84; R. 2, 106).

Nor, contrary to petitioners' contention (No. 189, Pet. 7–9, Br. 20–30), is such a result required by any alleged inadequacy of the provisions for judicial review of Board findings, in representation proceedings, that employers are subject to the Act. Such findings, whether made initially in proceedings under Section 9 or under Section

10 are reviewable by the circuit courts of appeals whenever the Board issues an order adverse to the employer based thereon (Sections 9 (d), 10 (e) and (f)). The constitutional adequacy of these statutory provisions for judicial review is not open to attack by the petitioners, who have been ordered to do no more than produce evidence. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50–52. See also *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146; cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113.

Petitioners' further contention (No. 189, Pet. 9–12, Br. 30–32) that certiorari should be granted in these cases because the circuit courts of appeals have expressed differing views as to the extent to which the *Endicott Johnson* decision is applicable to subpenas issued under the Fair Labor Standards Act[4] is without merit. That Act, unlike the National Labor Relations Act and the Walsh-Healy Act, does not confer upon the administrative agency primary jurisdiction to de-

[4] 52 Stat. 1060, 29 U. S. C. 201. See, *e. g.*, *Oklahoma Press Publishing Co.* v. *Walling*, 147 F. 2d 658 (C. C. A. 10), certiorari granted, No. 61 this Term; *Walling* v. *News Printing Co., Inc.*, 148 F. 2d 57 (C. C. A. 3), certiorari granted, No. 63, this Term; *Walling* v. *Le Belle Steamship Co.*, 148 F. 2d 198 (C. C. A. 6).

termine whether or not an employer has violated the Act. Jurisdiction to try that issue, including the issue of coverage, is vested in the district courts. *10 East 40th Street Building Inc.* v. *Callus,* No. 820, October Term 1944. Consequently, the question whether or not the district courts, before enforcing subpenas issued by the Administrator of the Wage and Hour Division in aid of investigations to determine whether or not to bring suit, may properly require the Administrator to show reasonable grounds for his investigation, is different from the question presented in the instant cases.

CONCLUSION

The decision of the court below is clearly correct. There is neither a conflict of decisions nor any novel question warranting review. The petitions for writs of certiorari should, therefore, be denied.

Respectfully submitted.

HAROLD JUDSON,
Acting Solicitor General.

ALVIN J. ROCKWELL,
General Counsel.
RUTH WEYAND,
MOZART G. RATNER,
Attorneys,
National Labor Relations Board.

JULY 1945.